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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 781

CLINTON T. JOHNSON and EVA G. JOHNSON,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the District Court of Appeal, Second Appellate District, Division Four, of the State of California

JURISDICTIONAL STATEMENT

LESLIE W. IRVING,
SCOTT D. KELLOGG,
Tribune Tower, 20th Floor,
Oakland 12, California,
Counsel for Appellants.

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Appeal from the District Court of Appeal, Second Appellate District, Division Four, of the State of California

JURISDICTIONAL STATEMENT

The appellants, Clinton T. Johnson and Eva G. Johnson appeal from the final judgment of the District Court of Appeal, Second Appellate District, Division Four, of the State of California, decided May 18, 1962, which affirmed the trial court's denial of any and all compensation for the "taking" and public use of the Johnsons' property since May 9, 1951, and reversed the jury's verdict fixing the fair market

value of the property as of April 3, 1958, and submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

At the time of docketing this case with this court, the record on appeal is being filed consisting of four volumes from the California District Court of Appeal[1] and one volume and one map container from the

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[1]The Certified Record from the California District Court of Appeal, Second Appellate District, consists of the following: Volume I contains: Volume I and II of the Clerk's Transcript on Appeal, pages 1 thru 416, which will be referred to herein as "CT"; Volume II contains: Volumes I and II of the Reporter's Transcript on Appeal, pages 1 thru 580; Volume III contains: Volumes III, IV, and V of the Reporter's Transcript on Appeal, pages 581 thru 1143; the Reporter's Transcript on Appeal will be referred to herein as "RT"; Volume IV contains: "Appellant-Plaintiff's Opening Brief", which will be referred to herein as "POB"; "Appellants-Defendants' Opening Brief", which will be referred to herein as "DOB", and "Respondents-Defendants' Reply Brief", which will be referred to herein as "DRB"; "Plaintiff's Brief, as Respondent and Plaintiff's Reply Brief, as Appellant", which will be referred to herein as "PRB"; "Appellants-Defendants' Closing Brief", which will be referred to herein as "DCB"; Opinion of the California District Court of Appeal rendered on May 18, 1962, which is reproduced in Appendix A and will be referred to herein as "App"; "Petition for Rehearing", which will be referred to herein as "DPR"; "Order Denying Petition for Rehearing", which will be referred to herein as "ODR"; "Defendants, Respondents and Appellants' Petition for a Hearing by the Supreme Court", which will be referred to here as "DPH"; "Answer to Petition for Hearing", which will be referred to herein as "PAH"; "Notice of Appeal to the Supreme Court of the United States", which will be referred to herein as "NA"; "Application for an Order Extending Time Within Which to Docket the Case and File the Record on Appeal" and Order Granting Application to January 17, 1963, which will be referred to herein as "Ext.1/17/63"; "Application for an Order Extending Time Within Which to Docket the Case and File the Record on Appeal" and Order Granting Application to January 31, 1963, which will be referred to herein as "Ext.1/31/63"; Certificate of Clerk of District Court of

San Luis Obispo County Superior Court (the trial court).[2] The method of referring to the record is explained below.[3]

The appellants, Clinton T. Johnson and Eva G. Johnson shall be hereinafter referred to as "the Johnsons". The appellee, the People of the State of California, shall be hereinafter referred to as "the State". The District Court of Appeal, Second Appellate District, Division Four, of the State of California, shall be hereinafter referred to as "the appellate court".

Emphasis in *italics* will be ours unless otherwise stated.

Appeal; "Order Denying Hearing after Judgment by District Court of Appeal" and Certificate of Clerk of California Supreme Court, which will be referred to herein as "ODH".

[2]The Certified Record from the San Luis Obispo County Superior Court, the trial court, consists of the following: "Excerpt from Trial Brief", pages 17 thru 40, which will be referred to herein as "Tr.B"; "Objections to Proposed Findings of Fact and Conclusions of Law and Request for Special Findings", which will be referred to herein as "Obj."; "Points and Authorities in Support of Objections to Proposed Findings of Fact and Conclusions of Law and Request for Special Findings", which will be referred to herein as "Obj.PA"; Certificate of County Clerk which certifies to the foregoing as well as the exhibits which are contained in a map container: Plaintiff's Exhibits Before the Court, 1, 3, 4, and 6, which will be referred to herein as "P.Ex.1,bc", "P.Ex.3,bc", "P.Ex.4,bc", "P.Ex.6,bc"; Defendants' Exhibits Before the Court, 3, 7, 12, and 14, which shall be referred to herein as "D.Ex.3,bc", "D.Ex.7,bc", "D.Ex.12,bc", "D.Ex.14,bc"; Defendants' Exhibits Before the Jury, 1, 10, 19, 23, 24, and 50, which shall be referred to herein as "D.Ex.1,bj", "D.Ex.10,bj", "D.Ex.19,bj", "D.Ex.23,bj", "D.Ex.24,bj", "D.Ex.50,bj"; "Remittitur" and Certificate of County Clerk, which will be referred to herein as "Rem".

[3]When an abbreviation is followed by a number, it will refer to the page of the document and when the number is followed by a colon and a number, the latter number will refer to the line on the refereneed page.

OPINIONS OF THE COURTS BELOW

The opinion of the appellate court has not, as yet, been officially reported but is unofficially reported in 203 A.C.A. 800 and 22 Cal Rep 149, and appears in the Appendix at pages i through xvi. The Findings and the Judgment of the trial court are not reported but appear in the Appendix at pages xvii through xxix.

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is an eminent domain action brought by the State pursuant to Article I, Section 14, of the California Constitution.

The opinion and judgment sought to be reviewed herein was rendered on May 18, 1962. (App. i through xvi.) Pursuant to Rules 27(b) and 45(a) of the California Rules on Appeal, and §§10, 12a, and 13, of the California Code of Civil Procedure, the Johnsons, on June 4, 1962, filed a Petition for Rehearing with the appellate court. (DPR.) The petition was denied June 6, 1962. (ODR.) The Johnsons then, on June 27, 1962, pursuant to Rule 28(b), filed a Petition for Hearing with the California Supreme Court (DPH) and it was denied (ODH) on July 11, 1962. The appellate court issued its Remittitur (Rem.) on July 18, 1962 and the decision became final as to both the District Court of Appeal and the California Supreme Court.

Pursuant to Rule 11 of the Revised Rules of the Supreme Court of the United States and Title 28 USC §2101, the Johnsons, on October 4, 1962, filed with the appellate court a Notice of Appeal to the Supreme Court of the United States. (NA.)

On November 8, 1962, Honorable Louis H. Burke, the Presiding Justice of the appellate court granted an application to extend the time within which to docket the case and file the record on appeal to January 17, 1963. (Ext.1/17/63.) On January 4, 1963, Honorable Edwin L. Jefferson, the Acting Presiding Justice of the appellate court granted a further extension to January 31, 1963. (Ext.1/31/63.)

It is believed that jurisdiction of this appeal is conferred on this court by Title 28 U.S.C. §1257(2) and (3).

The cases believed to sustain the jurisdiction of this court are the following: *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 7 L.Ed.2d 798, 803; *Boynton v. Virginia*, 364 U.S. 454, 457; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 142, 144; *Brown Shoe Co, v. United States*, 370 U.S. 294, 8 L.Ed.2d 510, 523-527; *Byrd v. Blue Ridge Rural Electric Co-op, Inc.*, 356 U.S. 525, 531; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241; *Dahnke-Walker Mill. Co. v. Bondurant*, 257 U.S. 282, 290; *Griggs v. County of Allegheny*, 369 U.S. 84, 7 L.Ed. 2d 585; *McCullough v. Virginia*, 172 U.S. 102, 123; *Napue v. Illinois*, 360 U.S. 264, 271; *Rochin v. California*, 342 U.S. 165, 167; *Saunders v. Shaw*, 244 U.S. 317, 319-320.

STATE STATUTES INVOLVED

The state statutes which were construed and applied by the appellate court are sections of the California Constitution: (1) Article 1, Section 14; (2) Article 1, Section 13; and (3) Article VI, Section 4½. The applicable portion of these constitutional provisions are quoted below:

"ARTICLE I

"Sec. 14. Private property shall not be taken or damaged for public use without *just compensation* having first been made to, or paid into court for, the owner, . . . which compensation shall be ascertained by a *jury*, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; . . ." 1 Cal Const A 165-166.

"ARTICLE I

"Sec. 13. . . . No person shall . . . be deprived of life, liberty, or property without due process of law; . . ." 1 Cal Const A 87.

"ARTICLE VI

"Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." 1 Cal Const A 655.

FEDERAL QUESTIONS PRESENTED BY THE APPEAL

1. Is Article I, §14 of the California Constitution, as construed and applied by the State Appellate Court to deny just compensation for the taking and public use of defendants' property since May 9, 1951, repugnant to the Due Process Clause of the Fourteenth Amendment and/or the Just Compensation Clause of the Fifth Amendment of the United States Constitution; where, prior to May 9, 1951, publicly owned properties adjoining the north and south boundaries of defendants' property were used for State Park purposes; where, prior to May 9, 1951, defendants' property was included in the San Luis Obispo County Master Plan for shoreline development; where, prior to May 9, 1951, the State Park Commission found that defendants' property was necessary for State Park purposes; where, on May 9, 1951, the State Park Commission filed suit to acquire said property for the purposes for which said Commission had found said property to be needed; where the public has used said property since May 9, 1951, for the purposes for which said Commission found said property to be needed; where the Commission's suit was dismissed for lack of prosecution on November 26, 1956; where, on October 18, 1957, the Commission adopted a second resolution that said property was still needed for State Park purposes; where, on April 3, 1958, the Commission again filed suit to acquire said property for the purposes for which the public was then using it; where defendants' property was rendered practically unsalable; where defendants were deprived of

the right to use or improve it; where defendants offered to prove that their property had been taken on May 9, 1951, the subsequent public use thereof, the resulting damage thereto and the just compensation payable therefor and said offer of proof was denied; and where the State Appellate Court "found" (although the offer of proof was denied) that there had been no taking of said property, that defendants could have prevented the public use of said property, and that the jury's verdict is "presumed" to include an amount for the "inconveniences" resulting from the public use of said property?

2. Is Article I, §14, of the California Constitution, as construed and applied by the State Appellate Court to effectively deny defendants' right to a jury trial, repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution; where the California Constitution provides that the just compensation payable for the taking of private property "shall be ascertained by a jury"; where the jury's verdict as to the market value of the defendants' property as of April 3, 1958 (the date of the issuance of the summons) was amply supported by the evidence; where the trial judge who heard all of the evidence, reviewed the verdict on motion for new trial and declined to disturb it; where the jury was fully instructed on the matters to be considered in determining the market value of said property; and where the State Appellate Court presumed that the jury did not follow said instructions, speculated that the jury might have believed that testimony as to

economic feasibility was an opinion of market value, denied the constitutional guaranty of trial by jury and reversed the jury's award?

3. Is Article I, Section 13, of the California Constitution, as construed and applied by the State Appellate Court to deny defendants their "day in court", repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution; where the trial court denied defendants' offer to prove that their property had been taken on May 9, 1951, the subsequent public use thereof, the resulting damage thereto, and the just compensation payable therefor; where the appellate court "found" that there was "no taking" of said property, that defendants could have prevented the public use of said property and that the jury's verdict is "presumed" to include an amount for the "inconveniences" resulting from the public use of said property; and where the trial court instructed the jury (at plaintiff's request) that evidence of "economic feasibility" was an essential prerequisite to the consideration of the adaptability of defendants' property for any particular use and the appellate court held that the introduction of such evidence by defendants constituted prejudicial error?

4. Is Article VI, §4½ of the California Constitution as construed and applied by the State Appellate Court to permit said court to reverse the jury trial based upon improper presumption and speculation, repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution; where the jury's verdict as to the market value of

the defendants' property was amply supported by the evidence; where the trial judge, who heard all of the evidence, reviewed the verdict on motion for new trial and declined to disturb it; where the jury was fully instructed on the matters to be considered in determining the market value of said property; and where the State Appellate Court presumed that the jury did not follow said instructions and speculated that the jury might have believed that testimony as to economic feasibility was an opinion of market value; where the State Appellate Court speculated that evidence of sales of certain "comparable" properties which were viewed by the jury, would be "more apt to mislead than to assist the jury in its determination of fair market value"; where the State Appellate Court speculated that certain remarks of the trial court "might well indicate to the jury that the judge believed the appraiser on the stand was either too high or too low in his appraisal" and also speculated that certain remarks made by the trial judge "gave the erroneous impression to the jury that they were to consider the unwillingness of the owners to sell the subject property in reaching their verdict", but that the "prejudicial effects of such remarks may have been overcome by instructions to the jury"?

CONCISE STATEMENT OF THE CASE

This case has two major aspects.

One involves, not only the denial of just compensation for the "taking" and public use of the John-

sons' property from May 9, 1951, to the present (over 11 years), but involves the denial of any and all compensation for such "taking" and public use in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The other major aspect involves the right to trial by jury to be protected by the Seventh and Fourteenth Amendments to the Constitution of the United States against invasion by an appellate court.

Johnson's property is a vacant private beach located in the City of Pismo Beach, California, an incorporated city. The City of Pismo Beach is located about halfway between San Francisco and Los Angeles and the western boundary of the City and the subject property is the Pacific Ocean. (RT.350: 15-16.)

The properties on the northern and southern boundaries of the Johnsons' property are publicly owned and are devoted to park purposes. Except for two paved city streets, all of the property east of the Johnsons' property is privately owned and is in a business district. (P.Ex.4,bc; RT.588-589.)

On May 9, 1951, the State brought its first action to obtain the property. (RT.303.) Except for the period from November 26, 1956, to April 3, 1958, the property has been subject to eminent domain actions from May 9, 1951, to the present. (RT.302-303.) As a result, the Johnsons were prevented from placing improvements on the property. *They were also prevented from receiving any income from the property.*

The California Code of Civil Procedure §1249 provides in part as follows:

> ". . . No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages."

Ever since May 9, 1951, the use by the public to which the property has been put is the same use to which the State would have put the property had it obtained an order for immediate possession on May 9, 1951. (RT.88:14-16; RT.94:1-3; RT.184:9-11.)

The State filed its second action on April 3, 1958. (CT.1-6.) The Johnsons filed a notice of motion to dismiss and a demurrer. (CT.9-19.) The demurrer alleged that the "taking" violated the Constitution of the United States. (CT.16:13-15.) The motion to dismiss was denied and the demurrer was overruled. (CT.25-26.) The Johnsons then filed an answer and cross-complaint. (CT.29-56.) The answer claimed the right to just compensation for the public use of their property for the period commencing May 9, 1951, and raised the federal question that the denial of just compensation for the "taking" and the public use of their property violated the Constitution of the United States. (CT.39.) On motion of counsel for the Johnsons, the Cross-Complaint was dismissed. (CT.88A-B.)

Before the jury was empaneled, a trial of the "legal" issues was had by the trial judge. The Johnsons submitted to the trial judge a trial brief, a portion of which was entitled "INTEREST ON THE

AWARD IS PART OF THE JUST COMPENSATION TO WHICH THE LANDOWNER IS ENTITLED" which again raised the federal question that denial of compensation for the "taking" and public use of the Johnsons' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (Tr:B.17-40.).

During the trial before the court, the Johnsons offered to prove the following (RT.302-314):

1. That prior to March 16, 1951, and continuing thereafter to the present, the master plan of the County of San Luis Obispo included the Johnsons' property as property to be acquired for public beach and parking purposes.

2. That on March 16, 1951, the State Park Commission adopted a resolution whereby it found that the Johnsons' property was necessary for State Park purposes and it directed that steps be taken to acquire the property.

3. That on March 16, 1951, and continuing thereafter until October 31, 1956, no money was available to the State for the purchase of the Johnsons' property.

4. That on May 9, 1951, the State filed its first eminent domain action to acquire the Johnsons' property.

5. That summons was issued and served on the Johnsons.

6. That the resolution authorizing the filing of the action on May 9, 1951, was for the purpose of acquir-

ing the Johnsons' property so that the State could permit the public to use the property for the parking of automobiles, for beach recreation, for swimming, for sunbathing, and these are the uses to which the Johnsons' property has been put ever since May 9, 1951.

7. That the use by the public to which the property was put from May 9, 1951, to the present, was the same use to which the State would have put the property had it obtained an order for immediate possession on May 9, 1951.

8. That by filing its action on May 9, 1951, the State prevented any and all development of the property by the Johnsons.

9. That by preventing the development of the property, the State also prevented the Johnsons, the owners of the property, from receiving income from the property.

10. That by filing its action on May 9, 1951, the State obtained the use of the property without first paying for such use.

11. That on October 31, 1956, the State Public Works Board passed a resolution approving the expenditure of moneys for the acquisition of the Johnsons' property. This was the first time money was appropriated to pay the Johnsons for their property.

12. That the State did not proceed to bring the action to trial and on November 26, 1956, the first eminent domain action was dismissed by the court on motion of the Johnsons made pursuant to §583 of the Code of Civil Procedure.

13. That during the time the first eminent domain action was pending, the Johnsons were required to spend considerable money for attorneys' fees and fees to experts.

14. That immediately after the first case was dismissed, the Johnsons authorized Scott D. Kellogg, one of the attorneys for the Johnsons, to take all necessary steps preparatory to the development of the Johnsons' property. Before development plans could be consummated, a new resolution was adopted by the State Park Commission.

15. That on October 18, 1957, the State Park Commission adopted a second resolution whereby it again found that the Johnsons' property was necessary for State Park purposes and it directed that steps again be taken to acquire the property.

16. That when it adopted its October 18, 1957, resolution, it referred to the Commission's March 16, 1951, resolution (the one which authorized the first suit) and then stated that the first suit "was held in abeyance as matching funds were not available".

17. That on April 3, 1958, the State filed its second suit to acquire the Johnsons' property.

18. That summons was issued and served on the Johnsons.

The offer of proof was denied.

After the legal issues were disposed of by the court, the jury was empaneled. (RT.318.)

Before any witnesses were sworn, the State and the Johnsons submitted jury instructions to the trial

judge. (R.T.321-322.) Among those submitted by the State was an instruction on feasibility and the instruction, as modified, was given by the trial judge to the jury as follows:

"PLAINTIFFS' INSTRUCTION NO. 22

"In considering the adaptability of property for any particular purpose or use, a factor to consider is whether its use for such purpose is economically feasible. If you believe, therefore, that a use of defendants' property for any specific purpose is not economically feasible, then such a prospective use for the property is not reasonably probable and does not add to the market value of the land and should be disregarded by you." (CT.248.)

Mr. John Badgley, an architect and planning consultant, called by the Johnsons, testified that the highest and best use of the property was to build a motel on the property and stated that to be feasible, the land should not cost more than $728,000. (RT. 348-366.)

Mr. James J. Mason, an appraiser called by the State, testified that to build a motel on the property, it was necessary to build an expensive sea wall costing $93,500. Mr. Mason then testified that after such a sea wall was built, the property would only support a value of $70,000, and therefore, it was not economically feasible. (RT.1013-1014.)

The appraisers called by the Johnsons testified that the market value of the property, taking into consideration all of the uses including the highest and best

use, was considerably less than Mr. Badgley's economic feasibility figure. Mr. Hutchinson testified that the fair market value was $[illegible]5,000 (RT.682); Mr. Quinn, $440,000 (RT.501); Mr. Gummere, $400,000 (RT.622); and Mr. Anders, $400,0[illegible] (RT.582).

The appraisers called by the State: Mr. Arsenio testified that the fair market value was $18,000 (RT. 860); and Mr. Mason, $20,000 (RT.1008).

The jury fixed the value at $130,963. (CT.219.)

The testimony of the appraisers called by the State and by the Johnsons told the jury of the sales on which their value of the Johnsons' property was based and such sales included vacant property as well as improved property. Where improvements were on the land, the witnesses testified as to the value of the improvements and as to the value of the land without the improvements. (See testimony of Anders, Gummere, Hutchinson, Quinn, Arsenio, and Mason.)

Over objection by the State on the ground of non-comparability, the trial court permitted evidence to be introduced regarding the sales of two motel properties which adjoined the beach and which were located within two blocks and five blocks respectiyely, of the property being condemned. (D.Ex.1,bj parcels H and J; RT.332; RT.488:12 to 492:1; RT.494:6 to 496:2.)

The jury viewed the property being condemned and all of the properties about which the witnesses testified. (CT.213:8 to 215:5.)

During the testimony of the appraisers called by the State, the trial judge made certain remarks which

are quoted in the opinion of the appellate court. (App. x and xi-xii.) However, counsel for the State did not object at any time prior to its motion for new trial to the remarks of the judge, did not ask for citation of misconduct or request an admonition to the jury. Furthermore, the jury was fully instructed that it should disregard all remarks made by the trial judge which might be construed to favor one side or the other. (CT.229.)

A reading of the reporter's transcript beginning at page 319 and continuing to the end, which is a full report of the trial before the jury, should convince any one that a fair and impartial trial on the sole issue of the "fair market value" of the Johnsons' property as of April 3, 1958, was accorded the State and the Johnsons.

Before the jury was instructed by the trial judge, counsel for the State and the Johnsons agreed that the trial judge hand to the jury the definition of "fair market value" as defined in Defendants' Instruction No. 19 and that the jury take the definition with them into the jury room. (CT.217-218.) The instruction did not include any compensation for the "taking" and public use of the property commencing May 9, 1951, but was limited to the "fair market value" of the property (CT.245) on April 3, 1958 (CT.223).

After the jury returned its verdict that the value of the Johnsons' property on April 3, 1958, was $130,953.00 (CT.218-219), the State prepared proposed Findings of Fact and Conclusions of Law which contained the following proposed Finding XI:

"XI

"The plaintiff has never taken possession of the said real property described in Paragraph IX of said Complaint." (CT.303.)

The Johnsons filed objections in which they stated:

"1. Objection is made to proposed Finding of Fact XI on the ground that it is unfair to deny an offer to prove facts which would have clearly established a 'taking' and thereafter find there was no taking based on the absence of the proffered evidence. . . ." (Obj.1.)

In their Points and Authorities in support of their objections to the findings, the Johnsons cited *Jacobs v. United States*, 290 US 13, and *Ackerman v. Port of Seattle*, 329 P.2d 210. (Obj.PA.16.)

The trial court sustained the Johnsons' objection to Finding XI and it was ordered stricken. (CT.298.)

On November 17, 1960, the findings, as amended, and the judgment, were signed by the trial judge. (CT.299-312.)

Thereafter the State filed a notice of intention to move for a new trial. (CT.314-315.) One of the State's counsel filed an affidavit in support of the motion for a new trial. (CT.318-320.) And the State filed Points and Authorities in Support of its Motion for a new trial. (CT.323-333.)

One of the attorneys for the Johnsons filed an affidavit in opposition to the State's motion for a new trial. (CT.336-348.) In the affidavit, it was said:

> "Plaintiff had a fair trial. This is the second action instituted by the State to acquire this property; the State has had its 'day in court'; the jury has passed on the controversy and made its award, and the State should abide by it." (CT.336.)

The Johnsons also filed a memorandum in opposition to the motion for a new trial. (CT.351-394.)

The motion for a new trial was denied by the trial judge. (CT.399.)

The State then filed a notice of appeal to the Court of Appeal, Second Appellate District. (CT.400.)

The Johnsons then filed a notice of appeal from that part of the judgment which failed to provide for compensation to the Johnsons for the "taking" and public use of the property for the period commencing May 9, 1951. (CT.411.)

In the appellate court, the State filed its opening brief in which it raised three issues. (POB.22.)

The Johnsons filed their opening brief (DOB) and their reply brief (DRB) at the same time. They raised the federal question that the holding by the trial court denying them compensation for the "taking" and public use of their property was contrary to *Jacobs v. United States*, 290 US 13 and *United States v. Rogers*, 255 US 163. (DOB.14-15.) They also asserted that a reversal would be contrary to *United States v. 25.406 Acres of Land*, etc., 172 F.2d 990 (cert. den. 337 US 931) (DRB.7-11, 28-30, 66-67.)

The State filed its Reply Brief as Respondent and its Closing Brief as Appellants at the same time.

(PRB.) In that brief, the State attempted to refute the federal cases cited by the Johnsons. (PRB.8, 11, 17-19.)

The Johnsons then filed their Closing Brief (DCB) and in the appendix reproduced the entire decision of this court in *Griggs v. County of Allegheny.* (DCB.Appendix.) In their closing brief they again raised the federal question citing *Ackerman v. Port of Seattle,* 55 Wn. 400, (DCB.19, 24-26, 29, 30-31, 32-33, 35); *Griggs v. County of Allegheny,* 369 US 84, (DCB.24, 26-30, 32, and 35); *Jacobs v. United States,* 290 US 13, (DCB.23, and 33); and *Portsmouth Co. v. United States,* 260 US 327. (DCB.6-8.)

The appellate court based its conclusion that the Johnsons were not entitled to compensation for the "taking" of their property and the public use for the period commencing May 9, 1951, to the present, upon five grounds:

1. The right to interest "springs from the judgment". (App. xiv.)[4]

2. The inconveniences to which the Johnsons were subjected by the delay are presumed to be considered

[4]However, the appellate court recognizes that where there is damage to the property before judgment, interest is allowed from the earlier date in order to give the property owner the "just compensation" to which he is entitled, citing §1255b of the California Code of Civil Procedure, but impliedly finds, although the offer of proof was denied, that there was no "taking" and that no compensation should be allowed for the public use. (App. xiv.)

and allowed for in fixing the amount of the compensation. (App. xv.)[5]

3. Although the Johnsons' offer of proof to show a taking was denied, the evidence offered shows that it was the bathing public which used the beach and not the State Park Commission. (App. xv-xvi.)[6]

4. The cases of *Ackerman v. Port of Seattle*, 55 Wn. 400, and *Griggs v. County of Allegheny*, 369 US 84, relied upon by the Johnsons are not analogous to the instant case. (App. xvi.)[7]

5. The Johnsons had the power to exclude the trespassing public. (App. xvi.)[8]

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[5]The record shows conclusively that no compensation was included in the verdict of the jury for the many years delay that the Johnsons' property was subject to eminent domain actions and that the presumption relied upon by the appellate court has no basis in fact. (CT.245 and CT.223.)

[6]This court disposed of a similar argument in *Griggs v. County of Allegheny*, 369 US 84, when the County argued that it was the airlines and not the County which took the property.

[7]An analysis of this case as compared to *Ackerman v. Port of Seattle*, 55 Wn. 400, and *Griggs v. County of Allegheny*, 369 US 84, is set out fully in the Johnsons' Petition for Hearing in the California Supreme Court at pages 20 thru 22, 9 copies of which are furnished in addition to the copy included in the record. (DPH.20-22.)

[8]Neither counsel for the State nor counsel for the Johnsons, in their briefs or in their argument before the appellate court, proposed that the Johnsons had the power to exclude the trespassing public. No authority has been cited by the appellate court for its novel rule. Where water overflows the owner's land, should he build a dam to keep it out, *Jacobs v. United States*, 290 US 13; where guns are fired over his land, should he build a thick wall, *Portsmouth Co. v. United States*, 260 US 327; where low flying airplanes go over his land, should he send up balloons with steel cables attached, *Griggs v. County of Allegheny*, 369 US 84? It is obvious that this argument conceived solely by the appellate court, has no sound basis in fact or in law.

In addition to denying compensation to the Johnsons for the "taking" and public use of their property, the appellate court invaded the province of the jury by weighing the evidence, making factual rulings on the sufficiency of the evidence, did not view the evidence as a whole, did not allow the Johnsons to benefit of all their evidence, did not allow the Johnsons the benefit of all inferences and presumptions to be drawn from the evidence, did not resolve all conflicts in the evidence in favor of the Johnsons, indulged in presumptions contrary to the facts, ignored the instructions to the jury, speculated that the jury may have based their verdict on improper considerations, took away from the Johnsons their right to trial by jury, and erroneously held:

1. "Even though the jury was instructed on market value we cannot overlook the *possibility* that the jury was misled and confused by Badgley's testimony. The jury *might* well have believed that his statement of valuation was not speculative but rather was an opinion of market value entitled to great weight in their determination of fair market value." (App. vii.)[9]

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[9]To say that Mr. Badgley's testimony was concerned with valuation is not supported by the record. When asked by the trial judge if his figure represented the fair market value of the property, Mr. Badgley said: "Your honor, I am not a real estate appraiser, and that is not my concern." (RT.361:10-11:) It should be noted that the appellate court did not say that without question, the jury was misled, but the appellate court said there was the *possibility* that the jury was misled. The jury *might* well have believed etc.

2. "Here we have the attempted comparison of unimproved vacant land with improved, going business properties. There is no present similarity as to improvements, size or income. Because the alleged comparables have substantial improvements located upon them, it becomes immediately necessary for the real estate expert to separate the land values from the improvement values, sometimes not an easy or scientific task. (App. ix.)[10]

"We are of the opinion that because of the great lack of similarity and the difficulties involved any evidence of the sales of such alleged 'comparables' would have little, if any, value and *would be more apt to mislead* than to assist the jury in its determination of fair market value." (App. ix.)[11]

3. "It *might* well indicate to the jury that the judge believed the appraiser on the stand was either too high or too low in his appraisal. Furthermore, it *might* well encourage the jury, with apparent court approval, to bring in a split or compromise verdict.

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[10]To hold that to separate the land values from the improvement values by real estate experts is not an easy or scientific task is obviously not a fact. This court, as the appellate court should have done, can take judicial notice that this is done in eminent domain cases all of the time. The California Code of Civil Procedure §1845.5 provides: "In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to *the value of the real property including the improvements situated thereon* . . . ."

[11]In California as it is in this court, the rule is that: "the trial court has wide discretion in determining what evidence is admissible on the question of comparable sales." See *Monterey County Flood Control & Water Conservation Dist. v. Hughes*, 201 ACA 257, 275; a case decided by the same court which decided the instant case.

This tends to reward the side whose appraisers have 'stretched' their opinions as to value." (App. xi.)[12]

4. "In the instant case these remarks made by the trial judge on this subject gave the erroneous impression to the jury that they were to consider the unwillingness of the owners to sell the subject property in reaching their verdict." (App. xiii.)[13]

5. "While the remarks of the court mentioned above were undoubtedly improper *it is not clear that standing alone they would be sufficiently prejudicial to require a new trial.* The prejudicial effects of such remarks *may have been overcome by instructions to the jury.* In the instant case we have already noted other prejudicial errors and hence any error in the remarks made by the court were cumulative." (App. xiii.)[14]

The Johnsons filed a Petition for Rehearing (DPR) which again raised the federal question that the decision by the appellate court violated the Fourteenth Amendment to the Constitution of the United States. The Petition was denied. (ODR.)

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[12]The remarks by the trial judge stated the obvious, but the conclusions drawn by the appellate court with reference to a split or compromise verdict or that the appraisers have "stretched" their opinions of value is not supported by the facts or by the record and did not take into consideration Plaintiff's Instruction No. 8. (CT.229.) Furthermore, the appellate court has discredited the witnesses called by the Johnsons without having heard the testimony and observed the witnesses.

[13]The other remarks by the trial judge also stated the obvious, but the trial court's instruction to the jury certainly eliminated any possible erroneous impression. (CT.229 and CT.245.)

[14]It would seem that if the other two points by the State are not well taken, the appellate court's decision should be reversed and the trial court's judgment as to the "fair market value" of the property as of April 3, 1958, should be affirmed.

The Johnsons then filed a Petition for Hearing in the California Supreme Court (DPH) which again cited the violation of the Fourteenth Amendment to the Constitution of the United States (DPH.4, 12, and 21) and *United States v. 25.406 Acres of Land*, 172 F.2d 990, cert. den. 337 US 931 (DPH.33 and 44). The Petition for Hearing was answered by the State. (PAH.) The Petition for Hearing was denied. (ODH.)

The Johnsons then filed with the appellate court their Notice of Appeal to this court. (NA.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case presents important Constitutional questions involving the right to just compensation, the right to a jury trial, the right to a fair trial, and the right to have a judgment protected against arbitrary reversal.

This court has said:

> "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . ." (*United States v. Commodities Corp.*, 339 US 121, 124.)

> ". . . The concept of just compensation is comprehensive and includes all elements. . . ." (*Jacobs v. United States*, 290 US 13, 16-17.)

> ". . . A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an

> airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. . . ." (*Griggs v. County of Allegheny*, 369 US 84, 89-90.)

In a sense, this whole litigation is a denial of due process. The injustice of permitting the State to tie up the Johnsons' property for more than eleven years must be apparent to every one.[15]

How can the Johnsons ever obtain a fair trial, where the State requests the trial court to instruct the jury on the question of feasibility for a specific use and then claims on appeal and is upheld by the appellate court that the introduction of such feasibility evidence is prejudicial? The State is put in the position of saying: "Heads I win and tails You lose."

This case has already been in the courts since May 9, 1951, and can be in the courts for a long time in the future without interruption of the public use of the property and without any compensation accruing to the Johnsons if the decision of the appellate court is permitted to remain in effect, all in violation of the rights guaranteed by the Fifth, Seventh and

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[15] In *Miller v. City of Beaver Falls*, 388 Pa 189, 82 A.2d 34, 36, the court said:

> "The injustice to property owners of permitting a municipal body to tie up an owner's property for three years must be apparent to every one. The city can change its mind and abandon or refuse to take the property at the end of three years; but in the meantime the owner has been, to all intents and purposes, deprived of his property and its use and the land is practically unsalable. He cannot build thereon because if he does the law is clear that he cannot recover damages for the loss of any building erected within the plotted line. (citing cases) . . ."

Fourteenth Amendments to the Constitution of the United States.

The appellate court's opinion is contrary to decisions of this court supporting the right to just compensation,[16] supporting the right to trial by jury,[17] supporting the right to a "fair trial"[18] and supporting the right to have a judgment protected against arbitrary reversal.[19]

To defer the Johnsons' right to show that the appellate court denied them a fair trial, invaded the jury's province, and that its opinion prevents a fair retrial until after the convening of a second jury and the conclusion of a second trial involves needless delay and expense, imposes an unnecessary burden on the trial and appellate courts and is repugnant to every proper concept of the fair and just administration of justice. And if the Johnsons' access to this court can be deferred until after the convening of a second jury and the conclusion of a second trial, the procedure adopted by the appellate court on the Johnsons' first appeal to this court can be adopted to effect similar deferral until after the convening of a third, fourth, etc. jury and the conclusion of a third, fourth, etc. trial. In such a case, the appellate court has a

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[16] *Brown v. United States*, 263 US 78; *Griggs v. County of Allegheny*, 369 US 84; *Jacobs v. United States*, 290 US 13.

[17] *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 US 355; *Tennant v. Peoria & P.U.R. Co.*, 321 US 29.

[18] *Brinkerhoff-Faris Co. v. Hill*, 281 US 673; *Byrd v. Blue Ridge Rural Electric Co-op, Inc.*, 356 US 525; *Saunders v. Shaw*, 244 US 317.

[19] *McCullough v. Virginia*, 172 US 102.

method of perpetually preventing access to this court for it can apply to future appeals, the same procedure it adopted in connection with this appeal.

However, there is no necessity for a retrial. If this court determines that the appellate court invaded the province of the jury in violation of the Seventh and Fourteenth Amendments to the Constitution of the United States, the appellate court's decision would be reversed and the verdict of the jury would be reinstated. There is no necessity for a trial on the damages sustained by the Johnsons for the "taking" and public use because the State's liability could be determined by applying the principles established in the case of *Griggs v. County of Allegheny*, 369 US 84.

CONCLUSION

It is respectfully submitted that the federal questions involved are substantial and of exceptional public interest and importance and that this court has jurisdiction of the appeal.

Dated, Oakland, California,
January 24, 1963.

Respectfully submitted,

LESLIE W. IRVING,
SCOTT D. KELLOGG,
Counsel for Appellants.

(Appendices Follow.)

Appendices

Appendix A

In the District Court of Appeal of the State of California
Second Appellate District

DIVISION FOUR

2 Civil No. 25,896

People of the State of California,
Plaintiff, Appellant and Respondent,

vs.

Clinton T. Johnson, et al.,
Defendants, Respondents and Appellants.

Appeal from a judgment of the Superior Court of San Luis Obispo County. Ray B. Lyon, Judge. Reversed.

Proceeding in condemnation. Judgment reversed.

Stanley Mosk, Attorney General, Howard S. Goldin, Assistant Attorney General, N. B. Peek, Warren J. Abbott, Deputy Attorneys General for Plaintiff, Appellant and Respondent.

Irving & Kellogg, Leslie W. Irving, Scott D. Kellogg, for Defendants, Respondents and Appellants.

Both plaintiff and defendants appeal from a judgment in a condemnation proceeding after a trial by jury which fixed the value of defendants' property to be acquired by plaintiff.

Plaintiff alleges three errors were committed by the trial court which were prejudicial to the state. The issues raised are:

1. Did the trial court commit prejudicial error in allowing an architect-consultant to state the value of the subject property based on his feasibility study?

2. Did the admission of the sales of other properties, alleged to be noncomparable, constitute prejudicial error?

3. Did the trial court commit prejudicial error by its remarks in the presence of the jury?

Defendant appeals from the judgment on only one issue, namely: Did the trial court err in not allowing interest from a date prior to the entry of judgment?

On April 3, 1958, the State Park Commission in the name of the People of the State of California filed a complaint in eminent domain seeking to condemn the property owned by defendants Clinton T. Johnson and Eva G. Johnson located in the City of Pismo Beach, County of San Luis Obispo, for state park purposes, to wit, for the extension and improvement of Pismo Beach State Park. After a trial upon the legal issues in which the court found for the plaintiff, a trial upon the issue of just compensation was held before a jury on September 15 through September 30, 1960. The jury found the value of the subject

property as of April 3, 1958, was $130,953.00 and judgment in condemnation for that sum plus costs was entered. The judgment provided that interest thereon was to run from the date of entry of judgment until the date of deposit of the award.

The subject property is primarily a private sandy beach located in the City of Pismo Beach within a few hundred feet of the Pismo Pier. It is vacant and zoned for commercial use. The width of the subject property is approximately 557 feet. Its depth varies depending on the location of the ever-changing ordinary high tide line and could not be fixed with certainty on the condemnation date.

Defendants' first witness was John Badgley, an architect and planning consultant. Badgley made a "feasibility" study of the subject property complete with schematic diagrams for the sole purpose of showing that the land could be physically and economically adapted to his envisioned project which included a resort motel with swimming pool, restaurant and lounge bar. Badgley's plans utilized a building technique, a "floating foundation," which would eliminate the need for expensive sea walls. Certain figures were introduced over plaintiff's objections in connection with Badgley's economic feasibility study.

The court first sustained plaintiff's objections to the giving of any future income figures emanating from Badgley's study because of the speculation involved. The court then asked Badgley over plaintiff's objections what a purchaser could pay for the property consistent with the feasibility plan pre-

sented. Badgley then testified that, using an average of three accepted ways of determining feasibility, an amount of $728,000.00 could be paid for the land. The court then read the standard and accepted definition of fair market value to Badgley and asked whether the land could sell for that amount. Badgley declined to give any estimation of fair market value because as he stated: "Your Honor, I am not a real estate appraiser, and that is not my concern." He was only concerned with the "reasonable economic value" in answering a client's question of "what can I afford to pay for this; what can I expect to pay for it and still make economic ends meet."

Plaintiff moved to strike out the part of the testimony giving the price someone could pay for this land but this motion was denied. The court then stated: ". . . the whole question is whether, if it was placed on the market for a reasonable time it would be—there would be a purchaser who has something like this in mind. It might not come to Mr. Badgley, I don't—but the definition is approximately as I have read it. To me that is the way we determine fair market value. The jury can take all of these things into consideration; give it what weight you feel it is entitled to."

On cross-examination Badgley stated that he arrived at the figure mentioned through a study of the potential income from the unit he designed.

The trial court erred by admitting into evidence testimony concerning the specific dollar value of the land, to wit, $728,000.00 for a specific project. How-

ever, all of the testimony regarding the adaptability of the land for that purpose was proper.

The rule and the reasons therefor are clearly stated in the leading case, *Sacramento Etc. R. R. Co. v. Heilbron*, 156 Cal. 408, 412, as follows: "... this court by its latest utterances has definitively aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, *the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value.* For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use." (Italics ours.)

The Heilbron rule has been followed in the later cases. In *Oakland v. Pacific Coast Lumber Etc. Co.*, 171 Cal. 392, the court said (pages 399-400): "Appellant 'takes exception' to the language of this court

in the Heilbron case to the effect that the value in terms of money which a witness might think the lands would have for some speculative use to which it was not put, and to which it might never be put, was not legitimate evidence. In the Heilbron case this court was not dealing with the question of the value of land as evidenced by a present use, but solely with the problematical values sought by the witnesses to be put upon the land for problematical uses. If the exception to the exclusion of this kind of evidence is well taken, then it would be quite permissible for the witnesses to say, 'if oil were discovered upon the land it would be worth twenty thousand dollars an acre,' 'if a gold mine were discovered upon it it would be worth ten thousand dollars an acre,' 'if a man wanted to buy it and establish a town site it would be worth three thousand dollars an acre,' and so on, until such inquiry in a condemnation suit would bear a close affinity to Lord Dundreary's famous question, 'If you had a brother would he like cheese?'"

In *Long Beach City H. S. Dist. v. Stewart,* 30 Cal. 2d 763, a witness in the condemnation proceeding was being interrogated concerning the value of the land "for an industrial purpose." The Supreme Court held "such evidence was clearly inadmissible." (page 771.)

That evidence of value, based upon a specific use or upon an owner's projected plan, is not admissible, see also *Laguna Salada Etc. Dist. v. Pac. Dev. Co.,* 119 Cal.App.2d 470, 476; *East Bay Mun. Utility Dist. v. Kieffer,* 99 Cal.App. 240, 250-251; *City of Stockton v. Vote,* 76 Cal.App. 369, 402-403. For an out of state

case in point, see *State v. Hub Realty Company* (1960), 239 La. 154 [118 So.2d 364, 369].

We believe the error committed here in permitting Badgley to testify as to the speculative value of $728,000.00 was prejudicial. The state's two appraisers testified that the property had a fair market value of $18,000.00 and $20,000.00 respectively. Defendants' appraisers testified to market values ranging from $400,000.00 to $445,000.00. The jury's verdict was for compensation in the sum of $130,953.00.

Even though the jury was instructed on market value we cannot overlook the possibility that the jury was misled and confused by Badgley's testimony. The jury might well have believed that his statement of valuation was not speculative but rather was an opinion of market value entitled to great weight in their determination of fair market value.

A second issue on appeal is whether or not it was error for the court to admit evidence as to the sale prices of two motel properties claimed by defendant to be comparable. Mr. Quinn, a real estate broker from Santa Barbara, testified for defendants that in his opinion the highest and best use of the subject property was for ". . . motel apartments, combination with restaurant and cocktail lounge and possibly some one or two small shops in the building." He testified as to certain sales that took place. Over objection on the ground of noncomparability he testified concerning a sale of the Edgewater Motel. This parcel was improved with an established and functioning motel. He gave the sale price of $350,000.00 and then gave the calculation he made to determine the land value.

In response to a question by the court he stated that in his opinion the land value of this parcel was $124,790.00. Again, over the objection of noncomparability, he stated the sale price ($180,000.00) and calculations made to determine land value ($55,000.00) of the Seawall Motel. The price of a second sale of this same property was admitted over the same objection.

The case of *County of Los Angeles v. Faus*, 48 Cal. 2d 672, reversed a long line of cases by holding that evidence of sale prices of comparable properties is admissible on direct examination. In holding that evidence of such sales is admissible, the court declared that certain limitations or "safeguards" are to be recognized, approving the quotation from McCormick on Evidence (1954), Section 166, page 348, as follows: "These safeguards are the following: The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted a wide discretion."

It is recognized, of course, that the trial court has wide discretion to determine what are "comparable properties." (*County of Los Angeles v. Faus, supra*, 48 Cal.2d 672, 678; *Covina Union High School Dist. v. Jobe*, 174 Cal.App.2d 340, 350).

In *Covina Union High School Dist. v. Jose*, 174 Cal.App.2d 340, the court said (page 350): "There can be no absolute formula or definition of what constitutes similar or like property. Certainly, similar does not mean identical. It appears to us that the determination must vary with each particular case. The *Faus* case, *supra*, mentioned the items of time, location, character, situation, usability and improvement."

In the instant case, the property being condemned is private, unimproved, sandy beach. The evidence here, admitted over objection, related to sales of existing, improved motel properties.

In our opinion, the admission of such evidence in the instant case does not recognize the "safeguards" mentioned in the *Faus* decision and does not come within the reasonable limitations of "comparable sales." Here we have the attempted comparison of unimproved vacant land with improved, going business properties. There is no present similarity as to improvement, size or income. Because the alleged comparables have substantial improvements located upon them, it becomes immediately necessary for the real estate expert to separate the land values from the improvement values; sometimes not an easy or scientific task.

We are of the opinion that because of the great lack of similarity and the difficulties involved, any evidence of the sales of such alleged "comparables" would have little, if any, value and would be more apt to mislead than to assist the jury in its determination of fair market value.

In *County of Los Angeles v. Bean*, 176 Cal.App.2d 521, the defendant sought to introduce evidence of other sales on the ground of comparability. The appellate court held such evidence inadmissible, saying at page 528: "The record in this case discloses no comparability. To the contrary, the dissimilarity is manifest. Other properties referred to by appellant contained producing wells with full equipment. Appellant's well had not produced for over 20 years and had no producing equipment."

The error in the instant case in admitting such evidence as to sales of noncomparable properties was also prejudicial to the appealing party (plaintiff) and such error was cumulative and reinforces our previous conclusion that the errors committed were prejudicial.

As a third point on appeal plaintiff contends that certain remarks made by the trial court in the presence of the jury were prejudicial. Plaintiff specifically complains of two series of remarks during the testimony of plaintiff's two valuation experts.

In the first series of remarks while the state's appraiser was on the stand the trial judge commented that the opinions of the appraisers were usually too high or too low, saying: "I always hope that all appraisers, and that includes the defendants' as well as the plaintiff's, that they don't appraise on one side or the other but give us a fair picture for the jury, but unfortunately we get it, usually, the appraisers for the defendant as [sic] high and usually those on the condemnors are low, I don't know why. I get it that way all the time."

Such a remark is, of course, improper while the appraiser for one side or the other is on the stand. It might well indicate to the jury that the judge believed the appraiser on the stand was either too high or too low in his appraisal. Furthermore, it might well encourage the jury, with apparent court approval, to bring in a split or compromise verdict. This tends to reward the side whose appraisers have "stretched" their opinions as to value.

The second series of remarks by the judge, also made during the testimony of one of the state's appraisers, has to do with the defendants being unwilling sellers. During the examination of the state's appraiser, Mr. Mason, in the presence of the jury, the court twice commented to the effect that Mr. Johnson was an unwilling seller. The discussion between the judge and Mr. Mason is set forth in the margin.[1]

These remarks of the court were likewise misleading because they are in conflict and inconsistent with the standard to be used by the jury in its determination of fair market value.

The law is well settled in this state that the concept of market value to be awarded in a condemnation action assumes a willing seller and a willing buyer.

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[1] "Q. [The Court] What we are trying to do here, and what I suppose you are keeping in mind, is to find what is the just compensation due Mr. Johnson for this property.

"A. Yes.

"Q. This is his private property. He doesn't want to sell it. The State is taking it, and he is entitled to just compensation.

"The Court: You see, this condemnation presents a serious problem and we are desperately trying to find out what is just, fair and just compensation to be paid Mr. Johnson. That is what

"In a condemnation proceeding the measure of damages is the market value of the parcel taken. . . . Market value is the price that would be paid by *a willing* purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted. It is hornbook law that it is market value that is involved, and not the value to the owner or to the condemner. . . ." (Emphasis added.) (*City of Daly City v. Smith*, 110 Cal.App.2d 524, 531 (1952); see also *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 303, 309 (1907); *People v. Vinson*, 99 Cal.App.2d 100, 102-103 (1950).

"The plaintiff was entitled to have the actual market value established in accordance with law, unaffected by any belief or suggestion that the property was being wrongfully condemned and taken" (*City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 152, 168.)

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we are concerned with mostly, and you have got to get all the evidence we can and all the advice we can about that it is. Mr. Johnson doesn't want to sell, but it is taken in the power of condemnation. Now, what is fair and just compensation? It isn't something like mathematics where two times two equals four or anything like that. We have a lot of testimony in here, including yours, and yet you probably haven't been able to pinpoint any—of as far as you are concerned, but there have been others that are different—see what I mean? If you are on the jury, you would squirm around because they have a serious problem to consider.

"A. Yes, they do, Your Honor. Do I understand that I am to consider that this property is being taken against his will? Is this a factor that I consider in arriving at my value?

"Q. He hasn't been able to sell it. They come before the Court and before a jury to determine a price. Now if he wanted to sell it and they wanted to buy it and they could agree on a price, yes, but they haven't done that. So, you are to consider that there is a controversy here between what he thinks is the value or what he would sell it for and what the state thinks it is worth. That is the reason you are here."

In the instant case these remarks made by the trial judge on this subject gave the erroneous impression to the jury that they were to consider the unwillingness of the owners to sell the subject property in reaching their verdict.

While the remarks of the court mentioned above were undoubtedly improper it is not clear that standing alone they would be sufficiently prejudicial to require a new trial. The prejudicial effects of such remarks may have been overcome by instructions to the jury. In the instant case we have already noted other prejudicial errors and hence any error in the remarks made by the court were cumulative.

Defendants' Appeal

Defendants appeal from only that part of the judgment which denied them interest on the judgment from May 9, 1951.

On or about May 9, 1951, plaintiff filed an action seeking to condemn the subject property. Plaintiff did not proceed with the action to acquire the property and defendants' motion to dismiss the action was granted on November 26, 1956. Plaintiff was still desirous of obtaining this beach property to connect the portions of the Pismo State Beach on either side of the subject property and the instant action in eminent domain was commenced on April 3, 1958.

Defendants contend that "the public has used the subject property since May 9, 1951, rent free," that "the state had 'clouded' the title to the subject prop-

erty since May 9, 1951, the date of the filing of the state's first action in eminent domain to acquire the subject property."

Defendant reaches the conclusion that there has been a public user for this period by virtue of the fact that the general public has been using the beach property in the same manner as it uses the adjoining state beaches and that such user would continue in the same manner after the state had acquired the property. This argument is entirely without merit and unsupported by the case law in this jurisdiction.

The rule is that interest on the judgment commences to run on the date the interlocutory judgment (*Bellflower City School Dist. v. Skaggs*, 52 Cal.2d 278) or final judgment is entered. The right to interest "springs from the judgment." (*Capistrano Union High School Dist. v. Capistrano Beach Acreage Co.*, 188 Cal.App.2d 612, 616.)

However, where an order of possession is obtained (*Metropolitan Water Dist. v. Adams;* 16 Cal.2d 676) or there is damage to the property before judgment (*Heimann v. City of Los Angeles,* 30 Cal.2d 746), interest is allowed from the earlier date in order to give the property owner the "just compensation" to which he is entitled. Such is the rule as recently codified by the amendment of section 1255(b) of the Code of Civil Procedure in 1961.

Defendants have tried to bring themselves within the line of cases which allows interest from a date prior to the entry of judgment because of the alleged

"taking" by the state from 1951 to the date of judgment.

Defendant contends that the fact that there was a condemnation action filed in 1951 and that the subject property was included in a master plan for the development of Pismo Beach State Park during the entire period "clouded" his title. This same contention was raised in *Los Angeles v. Gager*, 10 Cal.App. 378, 381-382, where the court, quoting from *Shoemaker v. United States*, 147 U.S. 282, said: "'It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to condemnation proceedings. But the owner was in receipt of the rents, issues and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority. [Citing cases.]'

"Until a citizen is deprived of possession of the property sought to be condemned, his right to the use and enjoyment thereof as it stood at the time of commencing the action is in no wise abridged. Therefore, it cannot, in a legal sense, be said that he is damaged until the actual taking of the property."

In the instant case there was no "taking" of the property by the State Park Commission prior to entry of judgment. Although defendants' offer of

proof to show a taking was denied, the evidence offered shows that it was the bathing public which used the beach and not the State Park Commission. The cases of *Ackerman v. Port of Seattle*, 55 Wash. 2d 400 [348 P.2d 664], and *Griggs v. County of Allegheny* (1962) ..... U.S. ....., 7 L.Ed.2d 585, relied upon by defendants are not analogous to the instant case. In those cases there was found a "taking" by low flying airplanes, making the property at the end of the flight paths uninhabitable. In the instant case defendants had the power to exclude the trespassing public. The fact that defendants did not follow this course will not serve to obligate plaintiff for the payment of interest on the condemnation award.

Because of the errors which occurred and which are mentioned above the judgment is reversed and the case remanded for a new trial on the issue of the damages to be awarded to the defendants.

As to costs on appeal, the principal appeal has been taken by the state; the appeal by defendants has involved only one point. Plaintiff is to bear all of its costs on appeal and seventy-five percent (75%) of defendants' costs on appeal; defendants are to pay twenty-five percent (25%) of their own costs on appeal.

Balthis, J.

We concur: Burke, P.J., Jefferson, J.

Filed May 18, 1962.
J. T. Alley, Clerk.

Appendix B

[Title of Court and Cause]

Filed Nov 17, 1960
A E Mallagh, County Clerk
By /s/ Elna Davis
Deputy Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause for the condemnation in fee simple of certain real property situated in the County of San Luis Obispo, particularly described in the Complaint on file herein, came on regularly for trial on September 13, 1960 and ended on September 30, 1960, before the Honorable Ray B. Lyon, Judge of the Superior Court, and a jury of twelve (12) duly qualified persons sworn to try the issues herein, upon the Complaint of the plaintiff and the answer of the defendants, Clinton T. Johnson and Eva G. Johnson.

Stanley Mosk, Attorney General of the State of California, by N. B. Peek and Warren J. Abbott, Deputy Attorneys General, appeared as attorneys for plaintiff, Scott D. Kellogg and Leslie W. Irving appeared at attorneys for defendants Clinton T. Johnson and Eva G. Johnson.

Witnesses on the part of plaintiff and defendants were sworn in the case and evidence, both oral and documentary, was introduced upon the issues.

The case was argued by counsel for the respective parties and the jury was instructed by the court.

Thereupon the jury retired and deliberated, and subsequently returned into court and rendered the following verdict:

> "We, the jury in the above-entitled action, find that as of April 3, 1958 the market value of the subject property owned by defendants, Clinton T. Johnson and Eva G. Johnson was the sum of $130,953.00.
>
> "Dated: September 30, 1960.
>
> "James E. Maino
> Foreman"

And the court, upon the evidence, pleadings, stipulations of counsel and verdict of the jury, and Good Cause Appearing Therefor, hereby makes and files the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

This action was regularly commenced by plaintiff on April 3, 1958, by the filing of its Complaint and issuance of Summons in the proper county to condemn the real property described in plaintiff's Complaint.

II

The allegations of Paragraphs I, II, III, V, VI, VIII, IX, and X of the said Complaint are true.

III

The allegations of Paragraph IV of the said Complaint are true, except that the date of the passage

of the said resolution referred to in said Paragraph was October 31, 1956 rather than August 31, 1956.

IV

All of the prerequisite acts of the administrative agencies are legal and valid.

V

The description of the real property sought to be acquired by the filing of the said Complaint, which description is set forth in Paragraph IX of the said Complaint, is definite and certain.

VI

The said description of said real property conveys title thereto to the line of the ordinary high tide.

VII

By virtue of said description of said real property in the said Complaint, the plaintiff sought to acquire title to the subject property to the line of the ordinary high tide, wherever that line may have been on April 3, 1958.

VIII

The use and purpose for which said real property is sought to be condemned is a public use authorized by law, to wit: the expansion and integration of portions of the Pismo Beach State Park.

IX

The plaintiff, acting by and through the State Park Commission of the State of California, and the Divi-

sion of Beaches and Parks of the State of California intends to use the said real property for the expansion and integration of portions of the Pismo Beach State Park as set forth in the resolution of the State Park Commission dated October 18, 1957, which resolution is referred to in Paragraph III of said Complaint.

X

Except as hereinafter stated public interest and necessity require the acquisition of the said real property.

Public interest and necessity do not require the acquisition of the mineral rights in the said real property. Therefore the court finds that defendants Clinton T. Johnson and Eva G. Johnson shall be allowed to retain the following interest in the said real property:

> "All the oil, gas, hydrocarbon and like substances and all other minerals and mineral rights, metallic and non-metallic, in, under and upon those portions of said land lying below the depth of 100 feet from the surface of said land, but without any rights of entry upon, possession, or use of any part of the surface of said land or any part of the subsurface thereof lying above the depth of 100 feet from the surface of said land for the purposes of prospecting for or exploring for or developing any of said substances."

Thus, public interest and necessity require the acquisition of the following described real property owned by defendants Clinton T. Johnson and Eva G.

Johnson which will hereinafter sometimes be referred to as the subject property:

"All that portion of Block "B" in the town of El Pizmo, in the city of Pismo Beach, in the County of San Luis Obispo, State of California, lying southeasterly of the southwesterly extension of the northwesterly line of Hinds Avenue, according to the map recorded June 5, 1905, in book A page 155 of Maps in the office of the county recorder of said county.

"Excepting therefrom all the oil, gas hydrocarbon and like substances and all other minerals and mineral rights, metallic and non-metallic, in, under and upon those portions of said land lying below the depth of 100 feet from the surface of said land, but without any rights of entry upon, possession, or use of any part of the surface of said land or any part of the subsurface thereof lying above the depth of 100 feet from the surface of said land for the purposes of prospecting for or exploring for or developing any of said substances."

XI

rt Order
-17-60
ED

~~The plaintiff has never taken possession of the said real property described in Paragraph IX of said Complaint.~~

XII

Defendants Clinton T. Johnson and Eva G. Johnson are entitled to no damages for the taking of the subject property other than its fair market value as of April 3, 1958.

XIII

That defendants Clinton T. Johnson and Eva G. Johnson are entitled to no interest on any judgment entered herein, other than legal interest at the rate of seven (7) per cent per annum from the date of entry of the Judgment herein to the date of the deposit of the amount of the Judgment into Court.

XIV

All the general and special City and County taxes on the subject property are paid to June 30, 1960. The defendants, County of San Luis Obispo, and the City of Pismo Beach, each have an interest in the subject property by virtue of liens for taxes, the total amount of which will accrue at the rate of $.0651 per day beginning July 1, 1960 and continuing to the date of the recordation of the final order herein, pursuant to Section 4986(2)(b) of the Revenue and Taxation Code. The total amount of said taxes is to be paid to the County of San Luis Obispo as the collection agent for said County and said City.

XV

Pursuant to stipulation of the plaintiff and defendants Clinton T. Johnson and Eva G. Johnson, the date of valuation is April 3, 1958, the date of filing the Complaint herein.

XVI

The fair market value of the subject property as of April 3, 1958 is $130,953.00.

Upon the foregoing facts the court makes the following:

Conclusions of Law

I

Plaintiff is entitled to an Interlocutory Judgment in Condemnation decreeing that upon payment to, or into court for the benefit of, defendants Clipton T. Johnson and Eva G. Johnson and the County of San Luis Obispo as their interests may appear the sum of $130,953.00, together with interest at the rate of seven (7) per cent per annum on said sum, from the date of entry of Judgment herein to the date of depositing said amount into court there shall be condemned in fee simple to plaintiff the following described property:

"All that portion of Block "B" in the Town of El Pizmo, in the city of Pismo Beach, in the County of San Luis Obispo, State of California, lying southeasterly of the southwesterly extension of the northwesterly line of Hinds Avenue, according to the map recorded June 5, 1905, in book A, page 155 of Maps in the office of the county recorder of said county.

"Excepting therefrom all the oil, gas hydrocarbon and like substances and all other minerals and mineral rights, metallic and non-metallic, in, under and upon those portions of said land lying below the depth of 100 feet from the surface of said land, but without any rights of entry upon, possession, or use of any part of the surface of said land or any part of the subsurface thereof lying above the depth of 100 feet from the surface of said land for the purposes of prospecting

for or exploring for or developing any of said substances."

for the use and purposes set forth in said Complaint to wit: for the expansion and integration of portions of the Pismo Beach State Park.

II

That payment into Court of the said total sum of money hereinabove specified shall be in full payment for the said subject property taken in fee simple, and shall terminate, cancel and extinguish the lien or charge for any taxes remaining unpaid to the County of San Luis Obispo or the City of Pismo Beach, including plaintiff's pro-rata share of said County and City taxes for the year 1960-1961, and all liens, leaseholds and encumbrances of whatsoever kind and nature.

III

That defendants Clinton T. Johnson and Eva G. Johnson and the County of San Luis Obispo are entitled to their costs of suit incurred herein.

Dated: November 17, 1960

/s/ Ray B. Lyon
Judge of the Superior Court

[Title of Court and Cause]

Filed Nov 17 1960
A E Mallagh, County Clerk
By /s/ Elna Davis
Deputy Clerk

JUDGMENT IN CONDEMNATION

Upon the filing of Findings of Fact and Conclusions of Law; and

It appearing that on or about March 7, 1960, an Order was entered in the above entitled action granting plaintiff's Motion For Judgment on the Pleadings as to each of the affirmative defenses alleged in the answer to the Complaint herein, and as to each and every one of the paragraphs in said answer with the exception of Paragraphs X and XI thereof, provided that the defendants shall not be precluded from, or the plaintiff relieved of:

(a) Judicial determination that the taking is for a public use;

(b) Judicial determination that all of the prerequisite acts of the administrative agencies are legal and valid;

(c) A determination of the just compensation to be paid the defendants for the real property sought to be taken.

and Good Cause Appearing,

It Is Hereby Ordered, Adjudged and Decreed that upon payment to, or into court for the benefit of,

defendants; Clinton T Johnson and Eva G Johnson and the County of San Luis Obispo, as their interests may appear, of the total sum of One Hundred Thirty Thousand, Nine Hundred Fifty-Three and No/100 Dollars ($130,953.00), together with interest on said sum at the rate of seven (7) per cent per annum from the date of entry of this Judgment to the date of deposit of said sum into court, there shall be condemned in fee simple to plaintiff, as against said defendants for the use and purpose set forth in plaintiff's Complaint to wit: the expansion and integration of portions of Pismo Beach State Park, the following described real property.

"All that portion of Block "B" in the Town of El Pizmo, in the city of Pismo Beach, in the County of San Luis Obispo, State of California, lying southeasterly of the southwesterly extension of the northwesterly line of Hinds Avenue, according to the map recorded June 5, 1905, in book A page 155 of Maps in the office of the county recorder of said county.

"Excepting therefrom all the oil, gas hydrocarbon and like substances and all other minerals and mineral rights, metallic and non-metallic, in, under and upon those portions of said land, lying below the depth of 100 feet from the surface of said land, but without any rights of entry upon, possession, or use of any part of the surface of said land or any part of the subsurface thereof lying above the depth of 100 feet from the surface of said land for the purposes of prospecting for or exploring for or developing any of said substances."

It Is Further Ordered, Adjudged and Decreed that the use for which the hereinabove described real property is sought to be condemned, is a public use authorized by law, to wit: the expansion and integration of portions of Pismo Beach State Park, and that the said real property is necessary to such public use.

It Is Further Ordered, Adjudged and Decreed that pursuant to the Order heretofore entered on or about March 7, 1960, plaintiff's Motion for Judgment on the Pleadings as to each of the affirmative defenses alleged in the answer to the Complaint herein, and as to each and every one of the paragraphs in said answer, with the exception of Paragraphs X and XI thereof, be and the same is hereby granted with respect to all defenses raised by defendants, both by way of denial and/or affirmative defense, provided that the defendants shall not be precluded from, or the plaintiff relieved of:

(a) Judicial determination that the taking is for a public use;

(b) Judicial determination that all of the prerequisite acts of the administrative agencies are legal and valid;

(c) A determination of the just compensation to be paid the defendants for the real property sought to be taken.

It Is Further Ordered, Adjudged and Decreed that upon payment into court of the total sum of money as hereinabove specified, it is to be distributed as follows:

1. To the County of San Luis Obispo, taxes which accrue at the rate of $.0651 per day commencing July 1, 1960, to the date of recordation of the final order of condemnation herein.

2. To defendants, Clinton T Johnson and Eva G Johnson, the balance of said total sum of One Hundred Thirty Thousand, Nine Hundred Fifty-Three and No/100 Dollars ($130,953.00), which shall be in full payment for the said real property hereinabove described, and shall terminate, cancel and extinguish as to said described real property all unpaid taxes, including plaintiffs' pro-rata share of the taxes of the County of San Luis Obispo and the City of Pismo Beach remaining unpaid, and all liens, leaseholds and encumbrances of whatsoever kind and nature on said real property hereinabove described.

It Is Further Ordered, Adjudged and Decreed that portions of real property taxes, if any, for the fiscal year 1960-1961 due defendant County of San Luis Obispo and defendant City of Pismo Beach which accrue after the date of recordation of the Final Order of Condemnation herein, which said taxes shall be, and the same are hereby ordered to be cancelled pursuant to Section 4986(2)(b) of the Revenue and Taxation Code.

It Is Further Ordered, Adjudged and Decreed that defendant Clinton T Johnson, Eva G Johnson and the County of San Luis Obispo, do have, and recover of

and from plaintiff their costs of suit incurred herein.

11-29-60
Court Order
RW

Defendants, Clinton T Johnson and Eva G Johnson to recover costs herein fixed in the sum of 729.20.

Dated: November 17, 1960.

/s/ Ray B Lyon
Judge of the Superior Court